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No. 84-1226

In the

Supreme Court of the United States

OCTOBER TERM, 1984

ROBERT E. BADHAM, ROBERT W. NAYLOR, ERIC SEASTRAND, ALDO SILVESTRI, MICHAEL W. COBB, FRANK O. VERLOT, DONNA S. RICHARDSON, PETER SCHRAGER, JANE BAKER, CHARLES A. MEYER, KIRK LINDSEY, DONALD DRISCOLL, AND ROGER T. ERICKSON,

Petitioners,

v.

THE SECRETARY OF STATE OF THE STATE OF CALIFORNIA, THE ASSEMBLY OF THE STATE OF CALIFORNIA, THE CALIFORNIA DEMOCRATIC CONGRESSIONAL DELEGATION, AND THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF RESPONDENTS THE MEMBERS OF THE CALIFORNIA DEMOCRATIC CONGRESSIONAL DELEGATION IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

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March 6, 1985

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QUESTION PRESENTED

Did the district court abuse its discretion by continuing to abstain under the particular circumstances of this case, including the following: 1) the petitioners alleged a novel federal constitutional claim of partisan gerrymandering, 2) a ruling on the several unclear state constitutional claims petitioners had additionally alleged could alter or obviate their federal constitutional claim, 3) the petitioners could have resolved the state law issues in the state courts in ample time to return to federal court if necessary and resolve the federal law issues before the 1986 elections, 4) the district court agreed to reassert jurisdiction if, despite petitioners' best efforts, they could not obtain a timely state court ruling, and 5) petitioners had failed effectively to litigate in state court following the district court's initial decision to abstain?

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STATEMENT OF THE CASE

The abstention order which petitioners challenge was interlocutory and the district court has made no findings as to any of the purported "facts" regarding California's present redistricting plan on which petitioners rely.

Respondents dispute these facts; but the proper battleground for this dispute is the trial court.[1] At this stage, the only facts in this case are procedural.

However, as background, respondents agree that following the 1980 census, the California Legislature enacted a Congressional redistricting bill, A.B.301. In June, 1982, however, the voters invalidated A.B.301 in a referendum. The Legislature, sensitive to the constitutional urgency of redistricting, then replaced the rejected A.B.301 by enacting a new Congressional redistricting bill, A.B.2X.[2]

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[1] The Republicans blithely ask this Court to assume that the redistricting plan at issue is indeed a political gerrymander. It is untrue that this has been "cynically acknowledged" by anyone, *cf.* Cert. Pet. at 3; rather, it is hotly contested.

While a full reply on this claim is well beyond the scope of this brief and the question presented, two points deserve passing mention. First, aside from pointing to irregularly shaped districts, the Republicans' principal "proof" of gerrymandering is the fact that they were unable to win a statewide percentage of seats proportional to the share of votes cast for various Republican candidates. But there is nothing novel about this lack of proportionality. Indeed, in 1967, then-Governor Reagan signed a bi-partisan redistricting plan that in 1968 gave Republicans only a 44.7% minority of the Congressional seats for a 55.3% majority of the cumulative two-party vote. Was Ronald Reagan a Democratic gerrymanderer? Second, the Republicans have insisted that the "grotesque" shape of district 38 (Appx. to Pet. at 49a), like that of the other districts depicted in the color maps presented to this Court, betokens a plan that will establish impregnable Democratic strongholds until the end of the decade unless the federal courts promptly intervene on their behalf to redraw such districts. But in the only serious Congressional challenge they mounted in 1984, the Republicans captured the district, which is now represented by a conservative Republican, Robert Dornan. *See* "Semi-Official Results", Appx. to Pet. at 52a-53a.

[2] The Republicans state that because A.B.2X passed by a two-thirds vote, they were prevented from challenging it by referendum as they had A.B.301. Cert. Pet. at 5. The claim is obviously false. As they make clear on the preceding page of their brief, A.B.2X did *not* pass by a two-thirds vote. It was the Republicans' *own* decision to forego this settled political remedy in favor of the present judicial experiment.

On March 8, 1983, petitioners, a group of Republican politicians and activists (hereafter the "Republicans") filed a complaint in the district court against the Secretary of State of California (the "Secretary"). The case was assigned to Judge Schnacke, and two additional judges were appointed to constitute a three-judge court pursuant to 28 U.S.C. § 2284. The complaint as amended on March 31, 1983 mounted multiple state and federal attacks on the validity of A.B.2X. As a matter of state law, it alleged that A.B.2X: 1) had not been read three times in both houses of the Legislature before passage, in violation of article IV, § 8 of the California Constitution; 2) essentially reenacted A.B.301 despite the latter's referendum defeat, in violation of article II, § 9 of the California Constitution; and 3) created discontiguous districts and split too many cities and counties across districts, in violation of article XXI of the California Constitution. As a matter of federal law, it alleged that A.B.2X: 1) created excessive population deviations among districts, in violation of the "one person, one vote" rule, and 2) invidiously discriminated against persons who tended to vote for Republican candidates. Finally, it alleged a deadline of December 15, 1983 by which the precinct lines for the 1984 elections had to be fixed.

The Republicans faced a serious initial hurdle to their population deviation claim. Although the language of A.B.2X as chaptered contained certain technical errors which, when read literally, created a population deviation of 3.083%, state officials had corrected these errors before the bill was implemented. As implemented, the bill had a remarkably small total deviation of 0.0538%. To secure a more plausible target for their population equality challenge, the Republicans further alleged that the *corrections* were unlawful, both under state law and under federal due process and equal protection principles, and that, once stripped of its corrections, the bill would have an excessive

population deviation. On April 21, 1983, the Republicans accordingly moved for partial summary judgment that the corrections had to be undone.

On April 7, 1983, the Assembly of the State of California (the "Assembly") had intervened as a defendant; on April 26, 1983, the members of the California Democratic Congressional Delegation (the "Delegation") intervened similarly and moved to stay the action under the *Pullman* abstention doctrine. *See Railroad Commission of Texas v. Pullman Co.*, 312 U.S. 496 (1941). The Delegation noted that all the traditional prerequisites of abstention existed: resolution of the state law issues could alter or obviate the federal constitutional questions; the state law issues were unclear; and the action dealt with redistricting, a sensitive area of state social policy. Also on April 26, 1983, the Delegation filed a complaint in the Los Angeles Superior Court for a declaratory judgment that A.B.2X was valid under state law and that the Republicans' state law claims were unfounded. The parties to the state action were essentially the same as in the federal action.[3]

On June 20, 1983, the three-judge district court issued its opinion abstaining unanimously.[4] It found that redistricting was indeed a sensitive area of state social policy. It noted that a state court ruling could indeed alter or obviate the federal constitutional question; "[i]f A.B.2X is found invalid because it violates the California Constitution . . ., the federal constitutional questions will become moot." 568 F. Supp. at 159. Finally, it found that the potentially determinative state law issues were indeed doubtful. Thus, it held, "[t]he rationale of *Pullman* applies most persuasively here." *Id.* at 161.

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[3] The defendants are the Secretary and the Republicans. The Assembly is not a party to the state action.

[4] It had announced orally on June 10 that it intended to abstain.

The Republicans determined to try to overturn the abstention order on appeal, and to delay the state court action until they could accomplish this. Although served with the state court complaint on May 16, 1983, the Republicans did not respond to it until June 28, 1983; even then, they did not answer, but instead filed a demurrer and a motion to change venue. On June 29, 1983, they filed a petition for writ of mandamus in the court of appeals for the Ninth Circuit.[5] They argued in part that litigation in the state courts meant "intolerable delays". At the Republicans' request, the court of appeals set an expedited schedule for briefing and oral argument. Meanwhile, on August 17, 1983, the Superior Court overruled the Republicans' demurrer and denied their motion to change venue. The Republicans filed an answer on the very last day permitted, September 16, 1983. By comparison, the Secretary of State had answered the complaint on May 25, 1983.

On September 26, 1983, the Ninth Circuit unanimously affirmed the district court's decision to abstain. In an opinion by Judge Wallace, it held that the requirements for abstention were met, "[e]ssentially for the reasons stated by the district court." 721 F.2d at 1172. The court of appeals rejected the Republicans' argument that "*Pullman* abstention is not appropriate in a voting rights case," but held that "abstention orders in cases involving voting rights require special consideration." *Id.*

> [B]efore abstaining in voting cases, a district court must independently consider the effect that delay resulting from the abstention order will have on the plaintiff's right to vote ....
>
> It may not be necessary to refuse to abstain in order to mitigate the dangers of delay. Instead, the district court

[5] On July 19, 1983, after the Delegation had pointed out that the abstention order was probably appealable, the Republicans also filed a timely notice of appeal.

> may fashion its order in a way to reduce those dangers. The district court has done so in this case. . . . [It] stated that the Republicans could return to the federal court if they were unable to obtain a sufficiently swift adjudication of state claims in the state courts.

Id. at 1173-74. The court of appeals declined at that time to address the Delegation's argument that the Republicans had brought delay upon themselves. It declared:

> The argument is premature. Clearly, the district court's permission for the parties to return to federal court if necessary is predicated on a good faith effort to obtain a disposition of the state law issues in state court. Thus, if the Republicans later seek to obtain a ruling by the district court prior to action by the state courts, the district court must examine any allegations that the Republicans have not acted in good faith, especially during the time period following its absention order.

Id. at 1174. It held that:

> The district court's abstention will have no immediate significant effect on federal voting rights. The deadline is December 15, 1983 — six months after the abstention order. Therefore, as the matter presently stands, there is no immediate need for federal intervention.

Id.

On September 30, 1983, nearly one-third of a year after the abstention order was first announced, the Republicans filed a petition for writ of mandate in the Supreme Court of California, asking it to exercise its discretionary original jurisdiction to resolve the state law issues. They demanded that it do so by November 1, 1983, realleging that the district lines had to be made certain by December 15, 1983. The Delegation filed a brief supporting their petition. Meanwhile, on October 11, 1983, the Republicans petitioned for a rehearing in the court of appeals. The petition for

rehearing was denied on December 12, 1983. The Republicans did not seek further review in this Court.

On October 27, 1983, the California Supreme Court denied the Republicans' petition. The grounds for its denial are significant. First, it found that:

> Petitioners' delay between June 10, 1983, and September 30, 1983, in seeking relief in this court has foreclosed reference for resolution of the disputed factual claims and disposition after briefing, argument, and preparation of an opinion by the November 1, 1983 date specified by petitioners.

Appx. to Pet. at 25a. Second, it held that:

> The relief requested is in any event inappropriate since, regardless of how the state law issues are resolved, time constraints might well necessitate use of the challenged congressional districts for the 1984 primary and general elections.

Id. It specified that its denial was without prejudice to any subsequent petition. *Id.* at 26a.

On December 12, 1983, the Republicans filed three motions in the district court. The first asked the court to vacate the abstention order. The second sought leave to amend the complaint. Their proposed amended complaint deleted the "one person, one vote" claims but left the partisan gerrymandering claim. It also deleted the state law claims, at least as an independent basis for relief; however, it retained the underlying allegations of these claims, that A.B.2X had not been read three times, created discontiguous districts and split too many cities and counties, and was excessively similar to A.B.301, all now allegedly evidence of gerrymandering. The third motion sought a preliminary injunction against the use of A.B.2X in the upcoming elections on grounds of gerrymandering.

These motions were filed *three days* before the Republicans' own December 15 deadline for any new districting. A hearing on the motion to vacate the abstention order was held on April 13, 1984. In it, counsel for the Republicans admitted that when they filed their motions, it was already too late to use a new plan in the scheduled 1984 elections. Appx. to Pet. at 14a.

After the hearing, on June 19, 1984, the district court held that it would continue to abstain:

> because [the Republicans] have not sought a resolution of the state law claims in good faith; they have not been refused such adjudication by any state court; the case still calls for resolution of the state law claims, if reasonably possible; and because continued abstention does not present any danger to [the Republicans'] voting rights which our reassertion of jurisdiction at this time might prevent.

Appx. to Pet. at 5a (footnote omitted). The court found that the Republicans "ha[d] not made a good faith effort to obtain a disposition of the state law issues in state court." *Id.* at 14a. Rather, they had "actively delayed" the Los Angeles Superior Court action. *Id.* at 12a. The California Supreme Court's denial of their petition was "understandable", but "expressly keeps the state courts open" to the Republicans. *Id.* at 13a. The court found that "the action in Los Angeles Superior Court provides plaintiffs with a sufficient opportunity to obtain a ruling on the state law issues." *Id.* at 14a. Nevertheless, "[t]o ensure that the state proceeding will not be unnecessarily delayed," the district court ordered the parties to file monthly reports on the status of the matter in the state courts. *Id.* at 15a. Judge Schnacke dissented.

On June 28, 1984, the Republicans again challenged abstention in the court of appeals, filing a notice of appeal

and simultaneous petition for writ of mandamus. In their briefs, they still disparaged the state court, labeling it a quagmire of congestion and delay. The court of appeals again granted expedited consideration, setting a hearing for September 13, 1984. On November 1, 1984, the court of appeals issued its memorandum opinion affirming continued abstention. It held:

> We are not satisfied that the Republicans have effectively pursued their claim in state court .... There is an insufficient showing by the Republicans that they cannot resolve the state issues in the state court early enough so that, if unsuccessful, they will be able to resolve their federal claims in the federal court in time for any required redistricting prior to the 1986 elections.

Appx. to Pet. at 2a.

On January 15, 1985, over a year and seven months after the original abstention order, the Republicans filed an "at-issue memorandum" in state court.[6] On January 18, 1985, they moved in the state court for an early trial date, and the Delegation joined and emphatically supported this motion. Their motion was heard and granted on February 8, 1985; the state court set a trial date of May 8, 1985.

On January 30, 1985, the Republicans filed the Petition for Certiorari. On February 8, 1985, they filed a motion to expedite, saying that "the only way to obtain relief in time for the 1986 election cycle is for this court to give the case expedited consideration," Motn. to Expedite at § 5, but failing to mention the hearing that same day on their ultimately successful motion for an early trial date in state court. This Court denied the motion to expedite.

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[6] An at-issue memorandum must be filed before a case can be set for trial. Cases come up for trial-setting in the order that their at-issue memoranda were filed. Cal. Rules of Ct. 209, 210, 217.

SUMMARY OF ARGUMENT

This case is unworthy of this Court's certiorari jurisdiction. It involves no novel legal issue and no conflict among the lower courts. It requires only the application of settled legal principles to facts peculiar to this case. Even more importantly, it stands likely to be mooted before the Court could even hear oral argument.

This case is a preeminent candidate for abstention, meeting all the traditional requirements of *Pullman*. The Republicans do not appear to contest this. Instead, they hypothesize new requirements, arguing that federal courts can never abstain in congressional redistricting cases; that even if they can, they should not have done so here due to the prospect of delay in the California courts; and that even if they should, they should cease abstention once the federal plaintiffs make even a hopeless feint at seeking a state court adjudication. These arguments rest shakily atop fundamental misconceptions regarding the abstention doctrine.

A federal court should abstain whenever a federal constitutional question could be altered or obviated by a ruling on an unclear issue of state law. This rule fosters two fundamental policies. First, the federal courts are to avoid unnecessary constitutional adjudications. *See Ashwander v. TVA*, 297 U.S. 288, 346-47 (1936) (Brandeis, J., concurring). Second, comity and federalism demand that the state courts, not the federal courts, determine unclear issues of state law, particularly where the determination implicates a sensitive area of state social policy. Here, the sensitive area of state social policy is redistricting. The unnecessary federal constitutional adjudication is whether A.B.2X is void as a partisan gerrymander, which subsumes thorny threshold adjudications of whether gerrymandering is justiciable and unconstitutional, and what judicially manageable standards a federal court might apply to such

a claim. The unclear state law issues which could alter or obviate the federal constitutional question are the Republicans' state law challenges to A.B.2X.

It is impossible to carve out an exception in this analysis for Congressional redistricting cases. Every *Pullman* abstention case involves some federal constitutional question, governed by federal standards. Nevertheless, abstention demands that such cases be decided on state law grounds if possible. Federal courts have abstained in state legislative redistricting cases; any distinction between these and Congressional redistricting cases is illusory.

Neither can the Republicans assert a delay exception. They point to dicta from decisions of this Court, in which the Court alluded to the undesirable effects of delay in particular cases. In these cases, however, the Court ultimately held that some traditional prerequisite of abstention was missing. The courts that showed the deepest concerns about delay were the lower courts in this very case. In abstaining, the district court announced that it would reassert jurisdiction if at any time abstention imperiled the Republicans' federal rights; the court of appeals affirmed expressly in reliance on this announcement. While there can be no dispute that the federal courts should be mindful of the delay abstention may entail, there should also be no dispute that the courts in this case were particularly mindful of it.

The critical factor, however is that the Republicans' complaints about delay ring hollow in light of the facts. Never, not at any moment in this case, has abstention prevented them from obtaining a timely ruling on both their state and federal claims. The Republicans themselves, not the district court nor the courts of California, are at fault. They took virtually no action in state court. Rather, as the court of appeals, the district court, and indeed the California Supreme Court found, the Republicans failed to

pursue their claims effectively in state court. The Republicans' argument that they have "discharged" their duty to litigate in state court flies in the face of this factual finding, a finding which under the "two-court rule" is virtually binding on this Court. *See Graver Tank & Mfg. Co. v. Linde Air Products Co.*, 336 U.S. 271, 275 (1949).

The facts show that on June 10, 1983, the district court announced it would abstain. At that point, the state declaratory relief action was pending and the Republicans could have pursued their claims in it. They had previously filed a motion in the district court for partial summary judgment; they could have merely changed the caption and refiled it in state court. They could moreover have filed an at-issue memorandum and moved for an early trial. From their success when they ultimately did so, it is likely that they could have had a trial in the fall of 1983. At that trial, the state court could have invalidated A.B.2X on state grounds, in which event the Republicans would have had no more need for relief.[7] Or, if it did not, they could have returned swiftly to argue their federal claims in federal court. Throughout, the district court stood ready to reassert jurisdiction should the state proceedings, despite the Republicans' best efforts, move too slowly.

What did the Republicans actually do in state court? They actively delayed the proceedings through meritless motions to dismiss and to change venue. They shied away from testing the state courts by moving for an early trial, preferring to tell the court of appeals that the state courts were a vast quagmire, rivaling the English equity courts in Dickens' *Bleak House*. On September 30, 1983, they filed

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[7] Relief, of course, is not what the Republican want; they want a test case on partisan gerrymandering. Their petition is artfully phrased. It never says that abstention kept them from getting relief; rather, it says that abstention kept them from testing their novel partisan gerrymandering claim. *See* Cert. Pet. at 11.

a belated and foredoomed petition in the California Supreme Court. Once this petition was denied, they did nothing further. Thus, it is no surprise that the 1984 elections took place in the A.B.2X districts. It is grossly unfair for the Republicans to blame this outcome on the lower courts; the blame lies at their own door.

Since abstention was proper in June of 1983, when the next Congressional election was 12 months away, a fortiori it is proper now, with the next election 15 months away. To believe that the Republicans cannot obtain relief in that time is to assume the district court did not mean it when it said it would retake jurisdiction should the state courts move too slowly. In any case, the state trial now set for May stands to moot the abstention question long before any election. There is no need for this Court to intervene.

ARGUMENT

I.

THERE IS NO CONGRESSIONAL REDISTRICTING EXCEPTION TO THE *PULLMAN* DOCTRINE

The Republicans argue that abstention is impermissible in a case challenging the constitutionality of Congressional districts, because federal law controls such voting rights cases. However, every *Pullman* abstention case, by definition, involves a federal constitutional question. In *Pullman* itself, the question was racial discrimination; here it is alleged discrimination against persons who tend to vote for Republicans. Although one lower court discerned in this Court "a reluctance to order abstention in cases involving certain civil rights claims, such as voting rights, racial equality, and first amendment rights of expression . . .," *C-Y Development Co. v. City of Redlands*, 703 F.2d 375, 381 (9th Cir. 1983) (citations omitted), any flat civil rights exception to abstention would swallow up the abstention doctrine entirely. Thus, as even the court in *C-Y* concluded,

"there is no *per se* civil rights exception to the abstention doctrine." *Id.*

Neither is there any voting rights exception. In *Harris County Commissioners Court v. Moore,* 420 U.S. 77 (1975), the Court required abstention in a case that challenged redistricting of justice of the peace precincts, on grounds including one person, one vote principles and racial gerrymandering. It did so even though the district court had already held the redistricting unconstitutional. The Republicans certainly cannot contend that abstention is improper in state and local redistricting cases. Federal courts have found no impediment to applying *Pullman* in such cases. *See, e.g., Cline v. Robb,* 548 F. Supp. 128, 133 (E.D. Va. 1982); *Bryant v. Whitcomb,* 419 F. Supp. 1290, 1298-99 (S.D. Ind. 1970); *Ince v. Rockefeller,* 290 F. Supp. 878, 885 (S.D.N.Y. 1968); *Dodd v. Barnes,* 279 F. Supp. 291 (E.D. Tenn. 1967); *Woodard v. Carteret County, North Carolina,* 252 F. Supp. 268 (E.D.N.C. 1966); *see also Grivetti v. Illinois State Electoral Bd.,* 335 F. Supp. 779, 785-86 (N.D. Ill. 1971), *aff'd,* 406 U.S. 913 (1972); *see generally Silver v. Brown,* 63 Cal. 2d 270, 275 (1965). As the court noted in abstaining in *Ince v. Rockefeller, supra,* 290 F. Supp. at 885-86, "the Supreme Court [has] observed that the power of a state judiciary to manage the apportionment process ha[s] not only been specifically recognized but ha[s] also been 'specifically encouraged' . . . ."

The Republicans appear to believe that special rules apply to abstention in cases involving Congressional redistricting. Yet they fail to propose any legal analysis to distinguish state legislative districts from Congressional districts in the abstention context. The Republicans' observation that "federal law . . . sets the standard" for Congressional redistricting is unhelpful. Federal law controls

state legislative redistricting just as much as it does Congressional redistricting. *Baker v. Carr,* 369 U.S. 186 (1962), the forebear of all reapportionment cases, was a state legislative redistricting case. Moreover, the considerations of comity that support abstention in state legislative redistricting are equally strong when the state is drawing Congressional districts. This Court recently reaffirmed these principles:

> Just as a federal district court, in the context of legislative reapportionment, should follow the policies and preferences of the State . . . whenever adherence to state policy does not detract from the requirements of the Federal Constitution, we hold that a district court should similarly honor state policies in the context of congressional reapportionment.

Upham v. Seamon, 456 U.S. 37, 41 (1982) (quoting *White v. Weiser,* 412 U.S. 783, 795 (1973)). The relevant considerations cannot turn on whether the state's representative is being sent to Sacramento or to Washington, D.C.; in either case, districting concerns the way the state elects its representatives. There is no basis for the Republicans' contention that Congressional redistricting is an exception to abstention.

II.

THE REPUBLICANS CANNOT SHOW THAT DELAY RESULTING FROM ABSTENTION IMPAIRED THEIR ABILITY TO PROTECT THEIR ALLEGED FEDERAL CONSTITUTIONAL RIGHTS

Abstention depends on a three-way partnership between the federal courts, the state courts, and the litigants. When the federal court abstains, it is relying on the state courts to decide the state issues quickly enough to protect the claimed federal right. It is likewise relying on the litigants; it assumes that the federal plaintiff will press for a ruling

on the state issues and that the federal defendant will not obstruct such a ruling.

This reliance is not an empty expression of hope, because the federal court can impose sanctions on its partners if they fail in their duties. If the state court balks, the federal court can retake jurisdiction; comity and deference to the state court are no longer required. Similarly, if the federal defendant obstructs the state court proceeding, the federal court may retake jurisdiction. Finally, a substantial body of authority holds that the federal plaintiff, not the federal defendant, has the burden of pressing the state court litigation. If the federal plaintiff does not litigate in good faith in the state court, the sanction works in reverse: the federal court can refuse to retake jurisdiction, and can even dismiss the remaining federal issues for lack of prosecution.

The district court has upheld its end of the bargain. It ordered the parties to report to it periodically on the progress of the state court litigation, promising to retake jurisdiction if the state courts should ever reject the Republicans' good-faith efforts to get a ruling. The federal defendants have upheld their end, by backing the Republicans' petition to the California Supreme Court, by joining their motion for an early trial, and by refraining from any act in the state courts that even the Republicans could construe as delay or obstruction. Now the Republicans must uphold their end of the bargain, by going forward in the state court.

A. The Possibility of Delay Does Not Preclude Abstention.

The federal courts should indeed be alert to the potential for delay that inheres in every abstention decision. The possibility of delay is one reason why abstention is justified only in those "special circumstances" when all the prerequisites of abstention exist. *Lake Carriers' Ass'n v.*

MacMullan, 406 U.S. 498, 509 (1972); *see Canton v. Spokane School District No. 81,* 498 F.2d 840, 845 (9th Cir. 1974). The Republicans, however, absurdly overextend this simple truth when they argue that "[t]he mere prospect of delay of adjudication of fundamental rights is sufficient to make abstention improper." Cert. Pet. at 12.[8]

The cases are legion in which federal courts abstained despite an allegation of ongoing or imminent violations of federal constitutional rights. *See, e.g., Harris County Commissioners Court v. Moore,* 420 U.S. 77 (1975) (ongoing voting rights equal protection violation found by district court); *Reetz v. Bozanich,* 397 U.S. 82 (1970) (ongoing equal protection violation found by district court). In *Pullman* itself, this Court required abstention even though the plaintiffs there alleged what the Court called "undoubtedly . . . a substantial constitutional issue," 312 U.S. at 498: ongoing racial discrimination against black Pullman porters.

In support of their proposed exception to *Pullman,* the Republicans have cited a number of cases in which a court denied abstention while adding that delay could adversely affect certain civil rights. But in each case, the court also found one of the traditional bases for abstention absent. *Zwickler v. Koota,* 389 U.S. 241, 249-50 (1967) (state law

[8] The Republicans' delay argument is merely their first argument — that there can never be abstention in a Congressional redistricting case — in disguise. Here, the district court ruled it would continue to abstain on June 19, 1984. At that point, the primary election had just been held and the next was not due until June, 1986. Since Congressional elections are held every two years, this was as far in advance of a Congressional election as a court could possibly abstain. Nevertheless, the Republicans claim that abstention was improper because it "ensure[d] that the congressional elections of 1986 and perhaps even those of 1988, will be held without [A.B.2X] ever having been tested for its constitutionality." Cert. Pet. at 11. Obviously in their view the next Congressional election is always imperiled by abstention; hence, abstention in a Congressional redistricting case can never be proper.

could not be construed to avoid or modify the constitutional question); *Harman v. Forssenius,* 380 U.S. 528, 535 (1965) (state law not doubtful); *Baggett v. Bullitt,* 377 U.S. 360, 375-78 (1964) (state law could not be construed to avoid or modify constitutional question); *Griffin v. County School Board of Prince Edward Co.,* 377 U.S. 218, 227-29 (1964) (state court had already passed on state law issues); *Duncan v. Poythress,* 657 F.2d 691, 698 (5th Cir. 1981) (state law not doubtful), *cert. granted, 455 U.S. 937, cert. dismissed,* 459 U.S. 1012 (1982); *see also Romero v. Coldwell,* 455 F.2d 1163, 1166 (5th Cir. 1972) (so reading *Harman*). Perhaps the court that has gone the farthest toward creating a delay exception was the court of appeals in this case. Bending over backwards in favor of the Republicans, it held that "before abstaining in voting cases, a district court must independently consider the effect that delay resulting from the abstention order will have on the plaintiff's right to vote." 721 F.2d at 1173. It nevertheless found abstention proper here.

The Court enunciated the correct standard for resolving claims of delay in abstention cases over four decades ago, in *Pullman* itself. There it examined state law and found that an action could be brought in the state courts to resolve the state law issues. It concluded:

> In the absence of any showing that these obvious methods for securing a definitive ruling in the state courts cannot be pursued with full protection of the constitutional claim, the district court should exercise its wise discretion by staying its hands.

312 U.S. at 501. Thus, the delay inherent in awaiting a state court ruling may counsel against abstention, but the burden is on the federal plaintiff to show that a state court ruling "cannot be pursued with full protection of the constitutional claim." The Republicans have never made this showing. They cannot make it; the courts of California

have offered them every opportunity to receive a prompt adjudication. As will be discussed below, the Republicans spurned the offer.

B. The Republicans, and Not the Courts of California, Are Responsible for the Lack of a Ruling on Their State Law Claims.

It is the Republicans, not the federal or state courts, who are derelict in their duties. The state courts have not ruled only because the Republicans have not fairly asked them to rule. Instead, they have been unalterably determined to avoid the courts of California, preferring to force a test case about partisan gerrymandering. Since April, 1983, they have been parties to the Superior Court action, which presents their state claims; rather than litigate it with the vigor they have displayed in federal court, the Republicans instead tried to have the action dismissed, and tried to delay it by moving to change venue. Their litigation in the California Supreme Court was more apparent than real. They should have known their petition to that court would be fruitless. They waited almost four months after the abstention order, and then demanded that the California Supreme Court make up the time they had wasted by ruling within an unprecedented one month. It is hardly surprising that the California Supreme Court found that the Republicans' own delay had foreclosed effective relief. The Republicans also might be excused from their duty if the Delegation or the Secretary had used unfair tactics to stall the state court action. However, the Republicans have never even suggested that they have been the victims of such tactics.

The district court's order is the perfect response to the situation. It has promised to monitor closely the progress of the state court action, ensuring that it will be able to retake jurisdiction promptly should the California courts fail to respect the exigencies of voting rights cases. In fact, the

judges of California share the concern of their federal brethren for the Bill of Rights, and will act promptly when it is implicated — if they are asked to.

The state court has set a May 8, 1985 trial date. The 1986 elections are on the distant horizon. The Republicans ask this Court to assume not only that the state courts will mistreat them, but that the district court will then break its promise to reassert jurisdiction if they have litigated diligently. This Court should decline their invitation.

1. After Abstention, the Federal Plaintiff Has the Burden of Seeking a Ruling on the State Law Issues.

As a matter of logic and common sense, one would assume that because the Republicans are the parties seeking to alter the status quo, they have the burden of going forward in any legal proceeding in this controversy. More, however, than logic and common sense compels this conclusion. Federal courts at all levels, including this Court, have recognized this allocation of burden.

Warren v. Government National Mortgage Ass'n, 443 F.2d 624 (8th Cir.), *cert. denied*, 404 U.S. 886 (1971), sets forth the basic rule. In that case, the plaintiff claimed that a state foreclosure statute was unconstitutional. The district court held that abstention was proper to allow the state court to interpret its own statute and state constitution. The court of appeals affirmed abstention. In its opinion, the court ordered:

> *Plaintiff* shall within a reasonable time institute appropriate state litigation to determine the validity of the challenged sale. If *plaintiff* fails to commence such litigation within a reasonable time *or if such litigation is commenced but not prosecuted with reasonable diligence,* the trial court may make such further order as may be appropriate.

443 F.2d at 626-27 (emphasis added). *Warren* is supported by a rather imposing body of authority. *E.g., Lake Carriers' Ass'n v. MacMullan,* 406 U.S. 498, 512-13 (1972) (Court remanded "with directions to retain jurisdiction pending institution by appellants [plaintiffs] of appropriate proceedings in the Michigan courts"); *Garfinkle v. Wells Fargo Bank,* 483 F.2d 1074, 1078 (9th Cir. 1973) ("Appellants [plaintiffs] are directed to institute an appropriate action in the state court to resolve the issues presented . . . and prosecute such action with reasonable diligence"); *see also Waldron v. McAtee,* 723 F.2d 1348, 1355 (7th Cir. 1983); *Anderson v. Redman,* 480 F. Supp. 830, 832 (D. Del. 1979); *Silverman v. Browning,* 359 F. Supp. 173 (D. Conn. 1972), *aff'd,* 411 U.S. 941 (1973).

To allow the Republicans to escape their responsibility as federal plaintiffs would nullify the abstention doctrine. Abstention always deprives the plaintiff of its choice of forum for its state claims, out of concern for federalism. For this concern to be vindicated, the plaintiff must have an incentive to present those claims promptly and diligently to a state tribunal. If the plaintiff's refusal to prosecute a state lawsuit were grounds to reassert federal jurisdiction, then the requisite incentive would be illusory; federal plaintiffs dissatisfied with an abstention order could defeat it by simple intransigence.

2. The California Supreme Court's Denial, Without Prejudice, of the Republicans' Tardy Petition Is Not a Basis to Retake Jurisdiction.

The Republicans' claim that they have acted affirmatively in state court is based almost wholly on the petition for writ of mandate they filed in the California Supreme Court on September 30, 1983. In the petition, the Republicans demanded that the Court decide the issues presented within an extraordinary one month. The Republicans claim that the petition, and its denial without prejudice, establish

their good-faith pursuit of their claims as well as the "bad faith" of the California Supreme Court in ignoring its duties in an abstention case. The district court, however, found the denial "understandable" and attributable to the Republicans' own foot-dragging.

The Republicans did not petition promptly or diligently. They filed their petition tardily — so tardily, in fact, that according to the Republicans' own timetable, the relief sought would have come too late to affect the 1984 elections. The Republicans had repeatedly said that in order to affect the 1984 elections, any new plan had to be produced, approved and implemented by December 15, 1983. Thus, any decision on the validity of A.B.2X would have to come, they said, by September 15, 1983. Despite this, the Republicans waited until September 30, 1983, fifteen days past their own deadline for a judicial declaration.

When at last they did file, the Republicans insisted on a decision within one month. Though the California Supreme Court has indeed acted with great dispatch in several recent writ proceedings, it has never been asked to act on such an unrealistic timetable nor in so complex a case. In *Legislature v. Reinecke*, 6 Cal. 3d 595 (1972), which the Republicans cite as one of the speediest original writ cases in the California Supreme Court, there were no disputed material issues of fact. The California Supreme Court resolves factual issues only rarely, and then by referring them to a special master. There the Legislature had passed redistricting plans but the Governor had vetoed them, and the major issue was whether to use the vetoed plans or the plans from the previous decade in upcoming elections. Here, the Republicans asked the Court to void the existing plan at a time when no alternative plan existed that could

be rapidly approved and implemented. It is hardly surprising that the Supreme Court cited the Republicans' dilatory behavior in denying their petition:

> Petitioners' delay between June 10, 1983 and September 30, 1983, in seeking relief in this court has foreclosed reference for resolution of the disputed factual claims and disposition after briefing, argument, and preparation of an option by the November 1, 1983 date specified by petitioners.

The Republicans put the California Supreme Court in an untenable position for which the Republicans themselves are responsible, not the court.

The reason the Republicans delayed until September 30 is clear: their federal appeal was pending until September 26, and they hoped for a ruling that abstention was wrong and that they could avoid state court litigation. They argue that they acted promptly enough once their appeal had been decided. Even were this true, it would not excuse their failure to go forward while their appeal was pending. Indeed, their failure to do so casts doubt on their repeated claims that using A.B.2X in the 1984 elections impaired precious voting rights. If they truly cared for these rights, one would expect them to press forward to invalidate A.B.2X in any court they could, rather than wager solely on an improbable appeal. To draw a somewhat fanciful analogy, suppose the Republicans' counsel represented a criminal sentenced to be executed in December, 1983. If the federal court had refused to decide his challenge to his sentence, deferring to a state action in which it found he could challenge it on state law grounds, it would be a surprising strategy to appeal the stay but wholly ignore the availability of relief in the state action. The Republicans' decision to follow essentially the same strategy demonstrates the fixity of their resolution to avoid the state courts.

Attempting to drum up a supposed conflict among the courts of appeal, the Republicans cite *Lister v. Lucey*, 575 F.2d 1325 (7th Cir.), *cert. denied*, 439 U.S. 865 (1978). Following abstention in that case, the federal plaintiffs commenced a state action for damages and declaratory relief. Their state action was dismissed, however, and the dismissal was affirmed by the state Supreme Court because they had failed to follow the procedure for damage suits against the state. They would have had to make a claim to the state legislature before bringing suit, even though another party's claim to the legislature, based on similar facts, had already been denied. The state Supreme Court further held that the declaratory relief claim, which sought a construction of the state law at issue for the guidance of the federal court, was properly dismissed because it related only to the damages claim.

The question as the court of appeals posed it was:

> whether a federal court that orders abstention ... is expected to wait until the federal litigant pursues state non-judicial remedies ... if the state courts refuse to clarify the law until those non-judicial remedies are pursued.

575 F.2d at 1331. This issue is very different from the one presented here. The *Lister* plaintiffs had pursued their state law remedies in good faith, as the court specifically found, through both the state trial and appellate courts, only to be relegated to protracted non-judicial remedies. The Republicans, on the other hand, have actively delayed in the state trial court. The California Supreme Court refused to rule only because the Republicans had made an effective ruling impossible. Far from requiring them to pursue non-judicial remedies, it specifically invited them to renew their petition to it or to the lower state courts.

However, the *Lister* court, although faced with facts far more compelling than any in this case, *refused* to "establish[ ] a general rule" that delay is cause to cease abstention. *Id.* at 1332. It declined to answer the very question it had posed. Rather, it relied on the additional fact that the state law was not so ambiguous as to require abstention. Thus, *Lister* does not control this case.[9] Even straining *Lister* to its utmost, it suggests only that questions of when a federal court should cease an initially valid abstention are too bound up in the facts of individual cases to merit this Court's consideration.

3. Despite the Republicans' Delay, the Superior Court Is Set to Rule in Time for the 1986 Elections, Thus Mooting All Abstention Issues.

That California's Superior Court, like its Supreme Court, has not yet ruled is likewise no basis to retake jurisdiction. First, its seeming inaction was due to the Republicans' own inaction. Courts do not issue rulings unless they are asked to. Second, now that the Republicans have finally asked for a trial date, the Superior Court has set one for May 8, 1985. That trial will moot the present abstention issues, and may also moot the gerrymandering test case the Republicans seek.

As the district court found, the Republicans have failed to litigate the Superior Court action in good faith. Appx. to Pet. at 14a. This conclusion is amply supported by the record. In the critical period following the district court's abstention order, the Republicans *actively delayed* any

[9] The Republicans also rely on *414 Theater Corp. v. Murphy*, 499 F.2d 1155 (2d Cir. 1974). *414* dealt with *Younger*, not *Pullman* abstention. In that case, as in *Lister*, the court of appeals essentially held that abstention had not been proper in the first place. 499 F.2d at 1155. It in no way held that some refusal to act by the state courts had made an originally proper abstention improper. Moreover, the district court had exercised its discretion in favor of retaking jurisdiction, and the court of appeals merely affirmed.

ruling, by demurring to the complaint and moving to change venue. Appx. to Pet. at 13a. As the Superior Court held, the demurrer was unfounded and the venue chosen was proper. Their obstructionist motions having failed, the Republicans ignored the action. They answered the complaint just one day before the Delegation could have taken a default judgment against them.

The Republicans have claimed that the abstention order must be terminated because there is too little time before the 1986 elections to resolve the state law issues. Of course, if the Republicans stall as they have so far, the claim is absolutely correct. However, the question of delay must be judged by what the Republicans could accomplish if they tried. They could have obtained a timely final ruling in state court long ago. Even now, they can obtain one amply before the 1986 elections.

The Superior Court action is one for declaratory relief. As such, it is given priority in trial-setting. Cal. Code Civ. Proc. § 1062.3(a). State law also provides for special trial-setting where a party can show that it needs an earlier trial than it would otherwise be entitled to. Cal. Rules of Ct. 375(b). Rather than use these provisions to obtain prompt relief, the Republicans have preferred to complain about the "congested" and "glacial processes" of the Superior Court. *See* Cert. Pet. at 6, 8. However, after filing their Petition, the Republicans at last availed themselves of these rights. In a motion heard February 8, 1985, they argued that an early trial was needed to avert the use of A.B.2X in the 1986 elections and so to safeguard federal voting rights. They asked for a trial in April or May; they received one on May 8. Clearly, had the Republicans filed a timely answer to the complaint, instead of filing their dilatory motions, and had they moved promptly for an early trial, the trial could have taken place in the fall of 1983.

The Republicans told the lower courts that the average time from at-issue memorandum to trial in the Los Angeles Supreme Court was over four years. Having now obtained a trial date less than four *months* from their at-issue memorandum, they have shifted their attack to the state appellate courts, saying that "the lengthy appeals process in California . . . takes 2 to 3 years." Reply to Resp. to Motn. to Expedite at 2. However, like a trial, an appeal could be had in far less time than the Republicans would suggest. Average figures are irrelevant. There is no reason to assume that the California appellate courts will be less expeditious in examining alleged voting rights cases than the federal courts. It would be an insult to comity to base a decision on such an assumption. If the intermediate appellate courts were to move more slowly than the Republicans desire, there is a simple solution: the California Supreme Court has discretion to hear an appeal directly from a trial court decision, bypassing the intermediate courts. *See generally* 6 B.E. Witkin, *California Procedure,* Appeal § 483. Although it declined to exercise its power to issue an original writ of mandate on a tardy and complex petition in an unprecedented thirty days, the California Supreme Court dismissed without prejudice and invited the Republicans to renew their petition. Thus, the state's highest court has expressed a willingness to hear the case in a timely manner when properly brought before it. It will be all the more likely to accept the case after a trial court has resolved all material factual issues.

The Republicans' hypotheses of delay depend on the additional hypothesis that the district court will renege on its commitment to reassert jurisdiction if the state courts do delay. The district court has undertaken to monitor the state court action, ordering the parties to report to it at monthly intervals. If, despite the Republicans' best efforts, months pass without visible progress, the district court is

plainly prepared to entertain a motion for an early return to federal court. The district court should be commended — certainly not reversed — for thus accommodating the respect for the state courts that comity requires with concern for claims based on voting rights.

III.
CONCLUSION

The district court has shown appropriate respect both for *Pullman* and for the Republicans' invocation of alleged voting rights. It has refused to allow a wholly proper abstention order to be defeated by inaction. Nevertheless, it has shown sensitivity to its duty to prevent harmful delay by insisting on monitoring the progress of the Republicans' claims in state court. There is ample time before the 1986 elections for the Republicans to pursue their state law claims in state court and then if necessary to return to federal court to pursue their federal claims. This Court should deny the petition for certiorari.

Dated: March 6, 1985.

Respectfully submitted,

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